THE HIGH COURT

[2011 No. 357 MCA]

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 (S.I. No. 133/2007)

AND

IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS OF ARTICLE 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS, 2007

BETWEEN

NATIONAL ASSET MANAGEMENT AGENCY

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 27th day of February 2013

1. This is an appeal by the National Asset Management Agency ("NAMA") pursuant to the provisions of Article 13 of the European Communities (Access to Information on the Environment) Regulations, 2007 (the "2007 Regulations") against a decision of the Commissioner for Environmental Information (the "Commissioner") made on the 13th September 2011. The issue for decision is whether the respondent

erred concluding that NAMA was a public authority by operation of article 3(1)(vi) of the 2007 Regulations.

Background

2. A request for information in accordance with Article 6 of the 2007 Regulations was made by Mr. Gavin Sheridan on 3rd February 2010. That request was refused by NAMA. Mr. Sheridan appealed this decision to respondent who upheld his appeal on the 13th September 2011.

3. The Commissioner's decision was communicated by letter of 13th September 2011 as follows: "In accordance with Article 12(5) of the Regulations, the Commissioner reviewed the decision of NAMA and found that it was not justified in refusing the request on the ground that it is not a public authority within the meaning of the Regulations. She annulled the decision of NAMA and found that it is a public authority within the meaning of the Regulations".

4. A party to an appeal under Article 12 of the 2007 Regulations or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision by virtue of Article 13(1) and it is on that basis the appellant makes this appeal.

Legal Issues

5. The legal and procedural issues which in this case are as follows:

a. Is NAMA a "public authority" for the purposes of the 2007 Regulations as found by the respondent?

b. Does the High Court have jurisdiction to quash the decision of the Commissioner and remit the matter to the Commissioner?

c. Does the High Court have jurisdiction to substitute its own decision for that of the Commissioner?

Appellant's Submissions

6. The Commissioner in her decision of 13th September 2011 determined that NAMA constituted a "public authority" as it came within the wording in Article 3(1)(vi) of the 2007 Regulations. Counsel for the appellant submitted that in reaching this conclusion the Commissioner erred in law.

Public Authority

7. Article 3(1) of the 2007 Regulations provides that:

"public authority" means, subject to sub-article (2)—

(a) government or other public administration, including public advisory bodies, at national, regional or local level,

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes—

(i) a Minister of the Government,

(ii) the Commissioners of Public Works in Ireland,

(iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),

(iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),

(v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),

(vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,

(vii) a company under the Companies Acts, in which all the shares are held—

(I) by or on behalf of a Minister of the Government,

(II) by directors appointed by a Minister of the Government,

(III) by a board or other body within the meaning of paragraph (vi), or

(IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;"

8. The central controversy in this appeal concerned the effect of the words 'and includes' in the forgoing definition. Counsel for the appellant contended that: (1) the ordinary meaning of "includes" is not (or is not only) as contended for by the Commissioner; (2) that there is no specific legal definition of "includes" and that the legal meaning applied to the words by the Commissioner is erroneous in the context in which it is used in the 2007 Regulations; (3) applying proper principles of statutory interpretation, the respondent's interpretation of Article 3 cannot be correct; and (4)

the interpretation of Article 3 contended for by the Commissioner is unconstitutional and a constitutional interpretation should be afforded to the provision.

Ordinary meaning of "includes"

9. The appellant argued that the ordinary meaning of the word "includes" should be applied and makes reference to both the Oxford English Dictionary (Second Ed. Vol. vii) and the Collins English Dictionary definitions. The appellant suggests that by adopting at least one of these dictionary definitions (for example: "To contain as a subordinate element, corollary or secondary feature;" or "To contain as a secondary or minor ingredient or element"), its use in Article 3(1) of the 2007 Regulations after the specified categories of (a) to (c) suggests that the bodies enumerated between (i) to (vii) are secondary elements of the bodies contained in the preceding provisions.

Legal definition of "includes"

10. The appellant refers to the reliance placed by the Commissioner on the definition of "includes" as provided in Murdoch's "*Dictionary of Irish Law*" (4th Edition). The appellant is of the view that that text is not a definitive authority in respect of the word "includes" but rather a tool to assist practitioners. That definition provides:

> "The word *include* has been held to be a word of extension when used in a statutory definition: *Attorney General (McGrath) v. Healey* [1972] I.R. 393. A word in a statute will have its ordinary meaning in addition to that included by the extension where the extension *include* is given its definition. The word *include* has the function of enlarging the meaning of

words or phrases with which it is associated: *Dilworth v. Stamp Commissioner* [1899] A.C. 99."

11. The appellant's view is that *Dilworth v. Stamp Commissioner* [1899] A.C. 99 highlights that while the word "include" is generally used to enlarge the meaning of words or phrases it may often have another meaning (at p. 105):

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible to another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purposes of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to those words or expressions."

12. It was urged by the appellant that in the appropriate context, 'include' might be a word of limitation. The *dicta* of Diplock L.J. in *Inland Revenue Commissioners v. Joiner* [1975] 3 All E.R. 105, is cited for this proposition:

> "An interpretation clause in a statute may serve two different purposes. If it states at greater length what an expression used in other provisions in the statute 'means' it is no more than a drafting device to promote economy of language. It is a direction to the reader: 'Wherever you see

this shorter expression in the statute you must treat it as being Shorthand for the longer one'. Alternatively an interpretation clause may be used by the draftsman not to define the meaning of an expression appearing in the statute but to extend it beyond the ordinary meaning which it would otherwise bear. An indication that this may be its purpose is given if it purports to state what the expression 'includes' instead of what it 'means' but the substitution of the one verb for the other is not conclusive of its being a direction to the reader: 'Wherever you see this shorter expression in the statute you may treat it as bearing either its ordinary meaning or this other meaning which it would not ordinarily bear'. Where the words used in the shorter expression are in themselves too imprecise to give a clear indication of what is included in it, an explanation of their meaning which is introduced by the verb 'includes' may be intended to do no more than state at greater length and with more precision what the shorter expression means."

13. Reference was made by the appellant to the decision of Mazza J. in the Canadian decision of *Allen v. Grenier* (1997) 145 D.L.R. (4th) 286: "'include' as defined in the *Black's Law Dictionary* is a 'term which may, according to context, express an enlargement and have the meaning of *and* or *in addition*, or merely specify a particular thing already included within general words theretofore used'. 'Including' within a statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation..."

14. The decision of McCarthy J. in *The Governors and Guardians of the Hospital for the Relief of Poor Lying in Women – The Rotunda Hospital v. Information Commissioner* [2009] I.E.H.C. 315, relied upon by the Commissioner in making her

decision, was also examined by the appellant. In that case, the relevant provision with regard to what constituted "personal information" was as follows:

> "'personal information' means information about an identifiable individual that—
>
> (a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or
>
> (b) is held by a public body on the understanding that it would be treated by it as confidential,
>
> and, without prejudice to the generality of the foregoing, includes—
>
> (i) information relating to the educational, medical, psychiatric or psychological history of the individual,
>
> (ii) information relating to the financial affairs of the individual,
>
> (iii) information relating to the employment or employment history of the individual,
>
> (iv) information relating to the individual in a record falling within section 6 (6) (a),
>
> (v) information relating to the criminal history of the individual,
>
> (vi) information relating to the religion, age, sexual orientation or marital status of the individual,
>
> (vii) a number, letter, symbol, word, mark or other thing assigned to the individual by a public body for the purpose of identification or any mark or other thing used for that purpose,
>
> (viii) information relating to the entitlements of the individual under the Social Welfare Acts as a beneficiary (within the meaning of the Social Welfare (Consolidation) Act, 1993) or required for the purpose

of establishing whether the individual, being a claimant (within the meaning aforesaid), is such a beneficiary,

(ix) information required for the purpose of assessing the liability of the individual in respect of a tax or duty or other payment owed or payable to the State or to a local authority, a health board or other public body or for the purpose of collecting an amount due from the individual in respect of such a tax or duty or other payment,

(x) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name would, or would be likely to, establish that any personal information held by the public body concerned relates to the individual,

(xi) information relating to property of the individual (including the nature of the individual's title to any property), and

(xii) the views or opinions of another person about the individual,

but does not include—

(I) in a case where the individual holds or held office as a director, or occupies or occupied a position as a member of the staff, of a public body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid,

(II) in a case where the individual is or was providing a service for a public body under a contract for services with the body, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service, or

(III) the views or opinions of the individual in relation to a public body, the staff of a public body or the business or the performance of the functions of a public body;"

15. In interpreting this section, counsel suggests that McCarthy J. placed particular emphasis on the addition of "and, without prejudice to the foregoing," immediately preceding "includes" and claims that this addition could only result in an expansive meaning being ascribed to the word. Counsel submitted that it did not follow that this case is authority for the proposition that "includes" must always be given an expansive meaning as a result. In the event McCarthy J. remarked:

> "I think that I might safely, and briefly, at this stage dispose of the proposition that if given information was to fall within the category of 'personal information', it would be necessary not merely that it should be one of the listed classes in the definition (at (i) to (x)) but also that it would 'satisfy' what the Commissioner has described as "the overarching prior requirements", namely, those at subparas. (a) and (b) above. It seems to me that this is a fundamental misconception in terms of an interpretation of the Act. This is because what is described as the list is 'without prejudice to the generality of the foregoing'; the point is, accordingly, that personal information may well extend beyond the listed items but that, whatever

else, such listed items are personal information. This type of provision is a commonplace in legal usage, if not on a more widespread basis."

16. The appellant proposes that the approach of the Commissioner in treating the words "and includes" as meaning "and also includes" or "without prejudice to the generality of the foregoing, includes" had the bizarre consequences that a company in which shares are held by the Minister would be a public authority but its subsidiary is only a public authority if it possesses information on the environment and has public administrative functions and responsibilities.

Interpretation of 2007 Regulations in accordance with Directive 2003/4/EC

17. In attempting to interpret the 2007 Regulations, the appellant also has regard to the provisions of the Directive which it implements, namely Directive 2003/4/EC on public access to environmental information (hereafter the "Directive"). Article 2(2) of the Directive provides a definition of "public authority":

> "'Public authority' shall mean:
>
> (a) government or other public administration, including public advisory bodies, at national, regional or local level;
>
> (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
>
> (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).
>
> Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their

constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

18. The appellant submits that the Directive does not identify those bodies set out in Article 3(1)(i) to (vii) of the 2007 Regulations and that the definition of "public authority" contended by the Commissioner exceeds that which is provided for in the Directive. The appellant refers to the case of *Von Colson v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891 which establishes the principle that national laws which implement European directives must be interpreted in conformity with the relevant directives and therefore the appellant contends that as a matter of proper construction the definition of "public authority" under the 2007 Regulations cannot exceed that provided for in the Directive.

19. Further, the appellant submits that there is a constitutional imperative to interpret the 2007 Regulations strictly in accordance with the Directive. The appellant submits that such an imperative exists in view of Article 29.4.7 of the Constitution, s. 3 of the European Communities Act 1972 and the decision of the Supreme Court in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329. The appellant refers to the dicta of Denham J. in that case (at pg. 366) who observed:

> "If the [domestic] regulations contained material exceeding the policies and principles of the directives then they are not authorised by the directives and would not be valid under s.3 unless the material was incidental, supplemental or consequential. In those circumstances if they were not incidental, supplementary or consequential the regulations would

be an exercise of legislative power by an authority not so permitted under the Constitution."

It is the appellant's contention that the interpretation of the 2007 Regulations asserted by the Commissioner would provide for substantive differences between the 2007 Regulations and the Directive, which were more than incidental, supplemental or consequential and therefore that the interpretation asserted by the Commissioner is both invalid as a matter of E.U. law and Irish constitutional law.

20. At trial, the appellant also referred to the *dicta* of Cooke J. in *M.S.T & J.T v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529 where he summarised the principle espoused by the appellant with regard to the transposition of directives:

> "27. In the ordinary course, where a statutory instrument has been adopted on the basis of s. 3 of the Act of 1972 in order to transpose a Community directive, the Court must presume, in the absence of explicit wording to contrary effect, that the legislative purpose is to give full and accurate effect to the provisions of the Community measure and no more. Thus, the 2006 Regulations fall to be construed in the light of the wording and objective of the Community measure. Where a regulation fails to give full or correct effect to the provision of the Community measure, it may be necessary for a court in an appropriate case to have regard to the possible direct effectiveness of the Community provision where the transposition period has expired and when the State or a State agency purports to rely as against a litigant upon the defective or incomplete domestic provision."

And further:

> "37. So far as concerns, on the other hand, national law, it is to be noted that s. 3 (2) of the 1972 Act provides that regulations may contain 'such incidental, supplementary and consequential provisions as appear to the Minister making the Regulations to be necessary for the purpose of the regulations . . .' Given that the additional wording [used in the 2006 Regulations] has the limited effect, as indicated above, of facilitating the interpretation and application of the transposed provision of Article 4.4 in individual cases where previous harm gives rise to compelling reasons but in which there might be doubt as to whether the criterion of risk of repetition is met, the Court considers that the additional wording constitutes an incidental and supplemental provision to the transposition."

The appellant submits on this basis that if there are two different ways of interpreting the definition of "public authority" then it is the interpretation which keeps it within the framework of the Directive which is the correct interpretation.

21. Counsel for the appellant asserts that the view of the Commissioner, expressed in her decision, that the Directive encourages an expansive approach to the definition of "public authority" is based on a deviation from the proper meaning of Recital (11) of the Preamble to the Directive. The appellant states that Recital (11) provides that the definition of "public authorities" should be expanded within the Directive to include those bodies which are so defined within the Directive and does not seek to expand the definition of "public authority" beyond that provided for in the Directive.

22. The appellant further submits that in respect of the provisions of Recital (24) of the Preamble to the Directive, which states that the Directive "shall not affect the right of a Member State to maintain or introduce measures providing for broader access to information than required by this Directive", the Commissioner

misunderstood this as somehow empowering the Minister to introduce measures by way of statutory instrument which are not provided for in the Directive and which are not incidental to its implementation. Rather, the appellant submits, such a function is only something which the Oireachtas can provide for in primary legislation.

Ejusdem Generis Principle

23. The appellant, in addressing the *ejusdem generis* rule of statutory interpretation, cited Bennion on Statutory Interpretation (pg. 1234) to the effect that: "For the *ejusdem generis* principle to apply, there must be a sufficient indication of a category that can properly be described as a class or *genus*, even though not specified as such in the enactment. Furthermore, the *genus* must be narrower than the general words it is said to regulate." In this instance, the appellant asserts the *genus* is defined in Article 3(1)(a),(b) and (c) (persons with public responsibilities relating to the environment) and that it is narrower than the general words it is said to regulate (as a board or body may have no public responsibilities relating to the environment). The appellant believes the Commissioner erroneously applied the rule by relating the *genus* to the term "public authority" rather than to the classes identified at Article 3(1)(a), (b) and (c) of the 2007 Regulations. In this regard it was asserted that the proper application of the rule shows that the general categories in Article 3(1)(i) to (vii) must be interpreted as being of the same *genus* as the specific categories in Article 3(1)(a), (b) and (c).

24. Finally, in respect of the question as to whether NAMA constitutes a "public authority" for the purposes of the 2007 Regulations, the appellant submitted that the 2007 Regulations cannot be interpreted so that a body might be considered a public body by virtue of Article 3(1)(vi) alone. It was contended that such a finding would

result in all boards or bodies established by or under statute (other than companies under the Companies Acts) being public authorities within the meaning of the 2007 Regulations.

Role of the Court in 'Question of Law' Statutory Appeal

25. In respect of the procedural issues raised at paragraph 5 (b) and (c) above, the appellant first addresses the question of whether the High Court has jurisdiction to quash the decision and remit the matter to the Commissioner. It appears to the appellant that there is no explicit power to quash and/or remit a decision provided for in the 2007 Regulations, however, it is submitted that the court has an inherent jurisdiction to quash a decision and that the absence of such power would otherwise severely impair the statutory appeal process. Counsel for the appellant refers to *Usk and District Residents Association v. An Bord Pleanála and Others* [2007] IEHC 86 and the *dicta* of Kelly J. therein, in respect of the court's power to remit a matter:

> "Since the coming into force of the Rules of the Superior Courts of 1986, the Court is granted an express power to remit a decision in respect of which an order of *certiorari* has been made. This is contained in O. 84, r. 26(4) which states:
>
> > 'Where the relief sought is *certiorari* and the court is satisfied that there are grounds for quashing the decision to which the application relates, the court may, in addition to quashing it, remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the court.'"

26. While the appellant accepts that the remarks of Kelly J. in the above case are *obiter dicta*, it is submitted that those observations are persuasive and that support for such a view can also be found in the case of *Sheehan v. District Judge Reilly* [1993] 2 I.R. 81 where Finlay C.J. in considering the provisions of Order 84, rule 26(4) stated:

> "It must first clearly be stated that this rule which, on the face of it, gives to the court a discretion as to whether or not to remit a matter in which an order has been quashed for further consideration, cannot, having regard to the limitation of the powers vested in the rule making authority pursuant to the Courts of Justice Acts be the grant of any new or different power that is not already vested in the court by virtue of statute or by virtue of inherent jurisdiction."

Kelly J. in *Usk* noting the above comments of Finlay C.J., states:

> "Interesting as this proposition may be, it is quite unnecessary for me to consider it since all I am doing in the instant case is deciding whether or not the discretion undoubtedly granted by the relevant rule ought to be exercised in the manner urged by Green Star and the Board."

27. Counsel for the appellant also refers to instances in which the courts have previously remitted cases to inferior tribunals in circumstances where matters had arisen on foot of statutory appeals and where no explicit power to remit had been provided by the statute in question, namely *F.P. v. The Information Commissioner* [2009] IEHC 574 and *N. McK v. Information Commissioner* [2006] 1 I.R. 260. On this basis the appellant submits that the power to quash the decision and remit it for further consideration is either or both implicit in the statutory framework and / or arises from the inherent jurisdiction of the court.

Power to Substitute Decision

28. In answering the second procedural issue raised at paragraph 5 above, the appellant is of the view that the power of the court to substitute its decision for that of an inferior tribunal exists by reference to the specific appellate jurisdiction which has been granted by statute. The appellant points to the decision of Finnegan P. in *Glancre Teo. v. Cafferkey* [2004] 3 I.R. 401 where he considered that the scope of the appeal should be determined by construing the statute which provided for it and also noted a distinction between general appellate jurisdiction and one limited to a point of law:

> "Accordingly, where the court is given an appellate jurisdiction it must construe the words used by the legislature to see whether the court has power to substitute its own opinion for that of the decision maker if it considers that the impugned act was wrong on the merits and not merely wrong in law. In *Dunne v. Minister for Fisheries* [1984] I.R. 230 Costello J. started from the premise that the Oireachtas, in conferring the appellate jurisdiction, must have intended that the jurisdiction on appeal should be wider than the court's powers when exercising its inherent jurisdiction at common law of review. He had regard to the fact that the section under consideration there did not expressly limit the appeal to one on a point of law. Adopting this approach in the present case I am satisfied that s. 5 of the Local Government (Planning and Development) Act, 1963 confers upon the High Court a full power of appeal and not some more limited form of review. There is nothing in the wording of the section to suggest any restriction and in these circumstances the High Court has full appellate jurisdiction."

29. The appellant submits that the approach of Costello J. in the *Dunne* case was recently taken by Cooke J. in *Rye Investments Ltd. v. Competition Authority* [2009] IEHC 140 wherein Cooke J. stated:

> "It is well settled that where the Oireachtas creates a statutory remedy by way of review or re-examination of a decision taken by an administrative or quasi judicial tribunal, the primary rule for determining the nature and scope of that review is that of construing the words used by the legislature. In particular, where the statute expressly employs the term 'appeal' rather than limiting the remedy explicitly to 'judicial review' or to an appeal on a point of law, it is of primary importance to determine whether the Oireachtas intended the Court to have power to substitute its own view of the merits of the contested decision for that of the decision maker if it judges that the decision was incorrect on its merits and not merely wrong in law."

30. Cooke J. in examining the provisions of s. 24 Competition Act 2002 went on to say:

> "(b) In principle and subject to the important limitation mentioned below, an appeal may raise 'an issue of law or fact' concerning the determination. The procedure before the High Court is not therefore confined to an appeal on a point of law and thus contrasts with a further limited review which is possible for the Supreme Court as provided in ss.(9) of s. 24. It follows, accordingly, that the appeal includes, but is wider than, a review of the substantive and procedural legality of a determination. To paraphrase the words quoted from Wade's Administrative Law by Costello J. in *Dunne v.*

Minister for Fisheries (above) the appeal may raise both the question 'Is it lawful or unlawful?' and the question 'Is it right or wrong?'

(c) On the other hand, it is equally clear that the procedure is not expressly an appeal by way of re-hearing of the original notification in which the decision of the court fully replaces that of the Authority and, in this respect, the provision can be contrasted with, for example, the procedure for review of an application for planning permission decided by a local authority when appealed to the Planning Board under s. 37 of the Planning and Development Act 2000 (see in particular ss(1)(g) of that Section)."

31. Cooke J. ultimately held that an appeal pursuant to s. 24 Competition Act 2002 did allow the court to substitute its own determination for that of the Competition Authority, however the appellant submits that from his observations above, Cooke J. considered that such an approach was not open to the court if it was simply examining an appeal on a point of law. The appellant submits that this is the logical implication given that the jurisdiction of the court to entertain an appeal is limited in these circumstances to identified issues of law. Counsel suggests that in any other approach the court would essentially be making, in the first instance, a decision which the legislature has deliberately vested, in the first instance, in an inferior body.

32. The appellant goes on to cite a decision of the Court of Appeal of England and Wales in *E. v. Secretary of State of the Home Department* [2004] Q.B. 1044, where that court examined the scope of the High Court's appellate jurisdiction in respect of a decision of the Immigration Appeal Tribunal. In examining the various remedies in administrative law the court opined:

"40. There was some discussion in the present case as to whether the grounds upon which the Court may question a decision of the IAT differ

materially, depending on whether the case comes before the Court as an application for judicial review, or as an appeal on a point of law. It would certainly be surprising if the grounds for judicial review were more generous than those for an appeal. In practice, such cases only come by way of judicial review because the IAT has refused leave to appeal, and its refusal can only be challenged in that way. There is certainly no logical reason why the ground of challenge should be wider in such cases.

41. More generally, the history of remedies in administrative law have seen the gradual assimilation of various forms of review, common law and statutory. The history was discussed by the Law Commission in its consultation paper *Administrative Law: Judicial Review and Statutory Appeal* (1994) (No. 126), Parts 17-18. The appeal 'on a point of law' became a standard model (supplanting in many contexts the appeal by 'case stated') following the Franks Committee report on *Administrative Tribunals and Inquiries* (1957) (CMND 218), which was given effect in the Tribunals and Inquiries Acts, 1958 (now Tribunals and Inquiries Act, 1992, Section 11). In other statutory contexts, (notably, planning, housing and the like), a typical model was a statutory application to quash on the grounds that the decision was 'not within the powers of the act'; see e.g. *Ashbridge Investments Limited v. Minister for Housing and Local Government* [1965] 1 WLR 1320. Meanwhile the prerogative writ procedures were remodelled into the modern judicial review procedures. In *R. v. Hull University Visitor ex parte Page* [1993] AC 682, the House of Lords acknowledged the evolution of a common set of principles 'to

ensure that the powers of public decision making bodies are exercised lawfully': pg. 701, per Lord Browne Wilkinson.

42. Thus, in spite of the differences in history and wording, the various procedures have evolved to the point where it has become a generally safe working rule that the substantive grounds for intervention are identical. (The conceptual justifications are another matter; see, for example, the illuminating discussion in Craig, *Administrative Law* 5th ed. (2003), (pp. 476 ff). The main practical diving lime is between appeals (or review procedures) on both fact and law, and those confined to law."

The appellant asserts that from the above authorities, an appeal on a point of law is limited and is analogous though not identical to judicial review. Counsel submits that the court's jurisdiction in hearing such an appeal is to decide whether or not the decision was right or wrong as a matter of law and, if it finds that it was wrong, to quash the decision and remit the matter to the inferior tribunal.

33. It follows from the above argument by the appellant, that the court in exercising its appellate jurisdiction in this case is limited to considering the specific subject matter of the appeal. The appellant submits that as the Commissioner has determined that NAMA is a public authority under Article 3(1)(vi) of the 2007 Regulations, it is not open to the court to consider whether NAMA might fall within another part of Article 3. Rather, the court has no jurisdiction to decide that NAMA is a public authority for reasons which were not canvassed before or considered by the Commissioner. The appellant cites Costello J. (at pg. 458) in *Vavasour and The Employment Equality Agency v. Northside Centre for Unemployed Limited and Others* [1995] 1 I.R. 450 in support of this to the effect that:

"...As the statute only permits appeals to this court on a point of law arising from a determination of the Labour Court and as the Labour Court made no determination in relation to the point now advanced, this court has no jurisdiction to entertain it."

34. Further, the appellant refers to the decision of the Supreme Court in the *Governors and Guardians of the Hospital for the Relief of Poor Lying-in-Women, Dublin v. Information Commissioner* [2011] IESC 26, where the Supreme Court held that the High Court ought not have considered an issue which was not canvassed before it and which did not form part of the decision of the Information Commissioner, Fennelly J. stating:

"[35]...I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance...

[37] I do not accept that the new point should have been considered either because many other cases raised the same issue or because it was a matter of importance. The act is clear: an appeal to the High Court lies only in respect of a point of law. It must be a point of law involved in the decision under appeal. Thus, I do not think that the High Court should have entertained the point."

However, the appellant notes that the Supreme Court did in fact consider the point in question due to the unusual circumstances that the issue, if un-reviewed, would stand as a binding precedent.

35. As such, the appellant's final submission is to the effect that the court is limited in its appellate jurisdiction to considering the issue which is brought before it

on appeal. Namely, that NAMA is a public body within the meaning of Article 3(1)(vi) of the 2007 Regulations. The court should not determine that NAMA is a public body under another provision of the 2007 Regulations or for a reason or reasons not canvassed before the Commissioner and on which the Commissioner made no determination.

Respondent's Submissions

36. The respondent submits that in order to decide on the correct interpretation of the 2007 Regulations and whether the Commissioner was correct in concluding that NAMA is a "public authority", the court must in the first instance look to the Directive which the 2007 Regulations implemented.

Implementation of the Directive

37. The Directive repealed Directive 90/313/EEC which the respondent submits had a narrower definition of "public authority" than that to be found in the Directive:

> "Any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity."

38. The respondent notes that there were problems with the practical application of Directive 90/313/EEC and suggests that in light of the signing of the UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the "Aarhus Convention") by the European Community a new directive was needed. The respondent asserts that one of the key aims of the Directive was to expand the definition of public authorities to encompass government or other public administration at national, regional or local level, whether or not they have specific responsibilities for the environment.

39. The respondent cites from Indent 11 of the Preamble to the Directive to the effect that one of the aims of the Directive is:

> "To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment."

40. Further, the respondent cites Indent 15 of the Preamble which states:

> "Member States should determine the practical arrangements under which such information is effectively made available. These arrangements shall guarantee that the information is effectively and easily accessible and progressively becomes available to the public through public telecommunications networks, including publicly accessible lists of public authorities and registers or lists of environmental information held by or for public authorities."

41. The respondent refers to the definition of "public authority" contained in the Directive and cited at paragraph 17 above but also refers to Article 3(5) of the Directive which states that:

> "For the purposes of this Article, Member States shall ensure that:

(a) officials are required to support the public in seeking access to information;

(b) lists of public authorities are publicly accessible;..."

42. In advancing the view that the interpretation of the definition of "public authority" should be an expansive one, the respondent also refers to Case C-204/09 of *Flachglas v. Federal Republic of Germany* and the decision of 14th February 2012. In that case the German Court had advanced questions in respect of institutions that are exempted from the definition of "public authority" and issues of confidentiality in respect of the proceedings of public authorities. The European Court of Justice observed:

> "30. It should be recalled as a preliminary point that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by the public authorities (see, to that effect, Case C-524/09 *Ville de Lyons* [2010] ECR I-0000, paragraph 35).
>
> 31. In adopting Directive 2003/4, the European Union intended to ensure the compatibility of European Union law with that convention in view of its conclusion by the Community by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of the public authorities, without that person having to show an interest..."

43. The respondent asserts that in any interpretation of the definition of public authorities under the 2007 Regulations, an expansive interpretation must be adopted which vindicates the principle of access to environmental information. The respondent also contends such a principle of interpretation derives from European law

(Case C14/83 *Von Colson* [1984] ECR 1891, Case C-106/89 *Marleasing* [1990] I-4135) and that it therefore necessarily trumps any Irish law or common law principles of interpretation. The Commissioner submits that no conflict arises between the two however, as a wide range of bodies are subject to the obligations under the Directive on a literal interpretation of its terms.

44. The respondent also cites the definition of "public authority" as defined in the 2007 Regulations and set out at paragraph 7 above. Further, the respondent refers to the provisions of Article 12 in respect of the powers of the Commissioner and Article 13 of the 2007 Regulations, asserting that the jurisdiction of this court is limited to hearing an appeal on a point of law only.

NAMA - a Public Authority

45. In addressing the main crux of the case the respondent refers to the Commissioner's finding that NAMA is a public authority for the purposes of the 2007 Regulations and summarises their position as follows:

> "...the legislature has determined that bodies coming within the definition at [Article 3(1)] (vi) have been determined to be public authorities within the meaning of the Directive and that it is not open to the Commissioner or indeed this Court to reopen that issue. NAMA is specifically covered by [Article 3(1)] (vi) and is therefore stated to be a public authority. Bodies not within the list at (i) to (vii) presumably have to meet the tests set out at (a), (b) or (c) in order to be a public authority within the meaning of the Regulations. Those identified at (i) to (vii) have been deemed to meet those tests by the legislature and are therefore 'public authorities'..."

Plain Wording Interpretation

46. The respondent stresses that her approach is based on the literal interpretation of the relevant provisions and cites Dodd '*Statutory Interpretation in Ireland*' (2003, Tottel) to that effect:

> "The intention of the legislature is primarily ascertained from the language or text chosen by the legislature to convey its intention. (*Crilly v. T&J Farrington Limited* [2001] 2 I.R. 251)"

47. Further, the respondent cites Kelly J. in *O'Dwyer v. Keegan* [1997] 2 ILRM 401 that:

> "The intention, and therefore the meaning, of an Act is primarily to be sought in the words used. They must, if they are plain and unambiguous, be applied as they stand. If there is nothing to modify, alter or qualify the language which is contained in the Act, then the words and sentences must be construed in their ordinary and natural meaning."

The respondent believes that the appellant's interpretation departs from the plain wording of the 2007 Regulations to such an extent that they would have the court ignore the wording of Article 3(1)(vi) and proceed to an analysis of whether NAMA falls under Article 3(1)(a), (b) or (c) instead.

48. It is the respondent's view that the legislature has already determined that certain bodies are deemed to meet the requirements of Article 3(1)(a), (b) or (c) and has expressly enumerated them at (i) to (vi) of the Article. The respondent therefore believes that the exercise in respect of compliance with the requirements of Article 3(1)(a), (b) or (c) has already been carried out by the legislature and that there is no need or entitlement on NAMA or indeed the Commissioner to alter this position.

49. The provisions of Section 5(2) Interpretation Act 2005 relate to construing ambiguous or obscure provisions in line with "...a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole." In this instance the respondent submits that the provision is neither obscure, ambiguous nor absurd and that as a result Section 5(2) simply does not apply.

Dictionary Definition

50. In addressing the interpretation of the particular meaning of "includes" as referred to by the appellant above, the respondent believes that the definitions cited from the Oxford English Dictionary and the Collins English Dictionary actually support the Commissioner's finding. Namely, that by reference to the Oxford English Dictionary, "includes" means "...contain, comprise, embrace" and by reference to the Collins English Dictionary, it means "...to add as a part of something else; put in as part of a set, group or category". On this basis the respondent is of the view that NAMA is part of a group, category or set of bodies that are determined to be public bodies.

51. The respondent also refers to the appellant's use of the dictionary definition "to contain as a secondary or minor ingredient or element". The respondent is of the view that even if the bodies listed in the Article are a secondary or minor category of public authorities (which the respondent holds as implausible), that this does not justify their exclusion and that the appellant is seeking to have the word "include" effectively read as "may include".

52. The respondent asserts that this is not the plain meaning of the word and that the court is not entitled to imply words into a statute or instrument unless the

provisions of Section 5(2) Interpretation Act 2005 apply. Further, the respondent submits that the *dicta* of Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R. 117 to the effect that dictionaries should only be used in limited circumstances applies.

53. The respondent also quotes the decision of McCarthy J. in *The Governors and Guardians of the Hospital for the Relief of Poor Lying in Women – The Rotunda Hospital v. Information Commissioner* [2009] IEHC 315, and refers to the same passage as the appellant quoted at paragraphs 14 & 15 above. The respondent examines the context in which "includes" appears following "without prejudice to the foregoing" in the legislation. However, she believes that in the context of that provision, "without prejudice to the foregoing" appears to emphasise that further classes of information may be considered to be personal information, while those enunciated do not curtail the classes of information that may be considered personal information even though they are not listed at categories (i) to (xii). In any event, the respondent emphasised the observation of McCarthy J. that "whatever else" the listed items in question were "personal information". It is contended on the Commissioner's behalf that such interpretation must derive from the word "includes" and that similarly in this case "whatever else" NAMA must be a public authority since the legislature has explicitly stated that boards or other bodies established under statute are public authorities.

54. The respondent further contends that the interpretation of Article 3(1) proposed by NAMA would have the effect of making the entire section from (i) to (vii) redundant because on the appellants interpretation, an additional test would need to be imposed not merely on sub-rule (vi) as to whether the requirements of Article 3(1)(a), (b) or (c) are met, but that such a test would be needed in respect of all bodies identified. The respondent submits that if that was the case, the reason for their

inclusion in the Article is impossible to identify. Rather, the respondent believes the only reason the bodies were included was to ensure legal certainty in respect of their inclusion in the categories of Article 3(1)(a),(b) and (c). *County Council of the County of Cork v. Whillock* [1993] 1 I.R. 231 is cited as support for the "...presumption that words are not used in a statute without a meaning...for the legislature must be deemed not to waste its words or to say anything in vain."

55. In assessing the content of the 2007 Regulations, it is submitted by the respondent that the interpretation adopted must be in accordance with the Directive and that which gives the Directive the widest possible application. The respondent submits that in adopting the 2007 Regulations, the Minister has specified certain bodies as public authorities and that far from being an extension of the definition of a public authority beyond that envisaged in the Directive, this interpretation ensures certainty as to the wide range of bodies treated as public authorities.

Ejusdem Generis Principle

56. With regard to the application of the ejusdem generis rule, the respondent believes it does not apply in the circumstances as the plain and ordinary meaning of the words is clear. Dodd observes that "Where a list or string of genus-describing terms are followed by wider residuary or sweeping up words, the ordinary or wide meaning of the residuary words is presumed to be limited to things of that class or genus." The respondent does not view the bodies listed at (i) to (vii) as "wider residuary or sweeping up words" and does not believe the rule of interpretation to have any relevance at all in this instance.

57. Further, the respondent contends that there is a failure on behalf of the appellant to understand the ambit of the 2007 Regulations and the Directive. This

contention is based on statements in the appellant's submissions to the effect that "it is only those public bodies having public responsibilities or functions relating to the environment that are public authorities with which the regulations are concerned." Rather, the respondent submits that while this may have been the position under the previous Directive 90/313/EEC, it is not the current position as evidenced by Indent 11 of the Preamble to the Directive.

58. Finally, with regard to the submissions made by NAMA to the Commissioner, the respondent addresses the appellant's proposition that "The test provided for in Article 3(1)(a), (b) or (c) of the public authority definition must first be met before applying the secondary test of whether the body in question is one of the classes of body listed in 3(1)(i) to (vii)." The respondent believes that there is no support in the 2007 Regulations for the view that the list of enumerated bodies is a "secondary list" and further that it is not correct to say that Article 3(1)(a), (b) and (c) are redundant where there may be other bodies which do not fall into the enumerated list but which may fall into Article 3(1)(a),(b) or (c). In conclusion, the respondent submits that the Minister has designated specific bodies as public authorities, as Member States are permitted, and that if the appellant wished to challenge such designation it was free to do so but it did not.

De Novo Ruling

59. With regard to the two legal issues raised by the court, the respondent submits that the court can issue a de novo ruling by substituting its own decision for that of the Commissioner. The respondent cites Lewis in "*Judicial Remedies in Public Law*" (4th Ed. Sweet & Maxwell, 2009) (para. 13-067) in respect of statutory appeals: "In the absence of specific provisions in the statute the court has all the powers of the body

appealed from and, in particular, the court may affirm, set aside or vary any order or judgment of the body appealed from and may refer any issue for determination back to the body appealed from." The respondent accepts that this power is circumscribed in certain respects and refers to *Mara (Inspector of Taxes) v. Hummingbird* [1982] 2 ILRM 42. In that case, Kenny J. held that findings of primary fact by an Income Tax Appeals Commissioner should not be set aside by the courts unless there was no evidence whatsoever to support them. However, Kenny J. also held that where conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside the findings on the ground that the commissioner misdirected himself as to the law or made a mistake of reasoning. Further, Kenny J. held that if conclusions show the commissioner adopted a wrong view of the law, they should be set aside. The respondent submits that because no issue arises of the court dealing with factual matters in this case, the relevant principle gleaned from the above case (that a conclusion of the commissioner should be set aside if such conclusions show he adopted a wrong view of the law), should be applied in this case.

60. Further, the respondent submits that if the court considers that the Commissioner has reached the correct result but for the wrong reasons, then it must be taking the view that she adopted the wrong view of the law and that in those circumstances it is open to the court to make its decision on the correct view of the law. The respondent also cites the decision of the Supreme Court in *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 taking the view that the court should not interfere with the decision of the Chief Appeals Officer (under the Social Welfare (Consolidation) Act 1981) unless it was based on an erroneous view of the law. The respondent also notes the comments of Hamilton C.J. who held that where conclusions are based on an identifiable error of law, such

conclusions must be corrected. The Supreme Court also affirmed the decision in *Mara* to the effect that if the Chief Appeals Officer erred in law in his construction of the contract, his decision would be liable to be set aside.

61. The observations of Geoghegan J. in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] 4 I.R. 150 are also relied upon by the respondent in this regard:

> "Clearly, on the authorities the High Court or this court on appeal is entitled to consider whether it was open to the appeals officers to come to the decision which she did arrive at and, if not, whether the evidence conclusively established that Mr. Walsh was an independent contractor. If so, the High Court or this court on appeal can make a declaration to that effect. A statutory appeal on a question of law is not a judicial review and a question of law includes the question of whether the evidence supports only one conclusion."

The respondent submits that the above passage is important as it demonstrates the different role the court has in a statutory appeal as opposed to judicial review and proposes that the role of the court is to carry out a *de novo* appeal subject to the limitations laid down in the *Mara* and *Henry Denny* cases.

62. The respondent submits that support for the application of such principles can be found in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272 where Fennelly J. referred to the judgment of McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 to the effect that when a court is only considering a point of law, if the conclusion reached by a body shows they have taken an erroneous view of the law, then that is also a ground for setting aside the decision. The respondent also cites

the *dicta* of Kearns J. in that case who considered McKechnie J.'s summary of the legal principles but also stated:

> "This is a helpful resume with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect, and the essence of this case is to determine whether the interpretation given first by the Commissioner and later by Gilligan J. to s.53 of the Education Act, 1998 was correct or otherwise."

63. The respondent also cites the decision of Sheehan J. in *Kruse v. Information Commissioner* [2009] IEHC 286 as supporting the principles mentioned above in the *Deely* and *Sheedy* cases. Further, the respondent relies on the decision of *Minister for Agriculture and Food v. Barry* [2009] IEHC 286 where the court considered its jurisdiction to review on an appeal on a question of law and referred to the case law cited above. Edwards J. in that case held that the Employment Appeals Tribunal misdirected itself on the law in certain respects and misinterpreted the judgment of Keane J. in *Henry Denny.* The respondent avers that while the head note to the decision notes that the matter was remitted to the Tribunal, there is no consideration of that issue within the judgment.

64. The respondent asserts that with regard to the jurisdiction of the court in adjudicating on an appeal on a point of law, the decision of Costello J. *Vavasour v. Northside Centre for the Unemployed* [1995] 1 I.R. 450 is illustrative of the approach to be taken:

> "The final ground of appeal raises a point which was not argued before the equality officer or the Labour Court and which did not form any part of the

grounds of appeal in the appellants' special summons. I do not think that it is one which can properly now be relied on. The appellant's complaint to the Labour Court was that discrimination contrary to s. 2 (c) of the Act of 1977 had occurred and it was this complaint that was considered firstly by the equality officer and then by the court itself. Now the appellants seek to argue that even if discrimination under s. 2 (c) did not occur, discrimination prohibited by s. 2 (b) (which provides that discrimination occurs when because of marital status a person is treated less favourably than another person of the same sex) took place. But this claim was never advanced at any time prior to the hearing before me — it was no part of the Labour Court's deliberations, and no part of its determination. As the statute only permits appeals to this court on a point of law arising from a determination of the Labour Court and as the Labour Court made no determination in relation to the point now advanced, this court has no jurisdiction to entertain it."

Remittal of the Decision

65. The respondent submits that the court has an inherent jurisdiction to remit matters to an inferior tribunal, such power having been clearly identified in *Usk v. An Bord Pleanala* [2007] IEHC 86. The respondent refers to the following passage from the judgment:

> **"The Power to remit**
>
> Since the coming into force of the Rules of the Superior Courts of 1986, the Court is granted an express power to remit a decision in

respect of which an order of *certiorari* has been made. This is contained in O. 84, r. 26(4) which states:

> 'Where the relief sought is *certiorari* and the court is satisfied that there are grounds for quashing the decision to which the application relates, the court may, in addition to quashing it, remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the court'.

No similar provision is to be found in earlier editions of the Rules of the Superior Courts. It was suggested in argument that the provision is declaratory of an inherent jurisdiction of the court. That argument gains support from observations contained in Collins and O'Reilly *'Civil Proceedings and the State'* (2nd Edition) where the authors' state that the High Court has always had jurisdiction to command a tribunal to rehear a case where it has quashed its order. They cite in support of that proposition the decision in *Rex v. Northhumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338 and an article contained in the *Irish Criminal Law Journal* published in 1993 intituled *'Certiorari followed by remittal'*. The proposition is supported by the observations of Finlay C.J. in *Sheehan v. District Judge Reilly* [1993] 2 I.R. where in considering the provisions of O. 84, r. 26(4) he said:

> 'It must first clearly be stated that this rule which, on the face of it, gives to the court a discretion as to whether or not to remit a matter in which an order has been quashed for further consideration, cannot, having regard to the limitation of the powers vested in the rule

making authority pursuant to the Courts of Justice Acts be the grant of any new or different power that is not already vested in the court by virtue of statute or by virtue of inherent jurisdiction'.

Interesting as this proposition may be, it is quite unnecessary for me to consider it since all I am doing in the instant case is deciding whether or not the discretion undoubtedly granted by the relevant rule ought to be exercised in the manner urged by Greenstar and the Board.

The exercise of the discretion.

The discretion to remit proceedings is wide one. There is not a lot of assistance to be gleaned from such case law as there is on the topic as to the factors to be taken into account in the exercise of that discretion. Many of the cases deal with the remission of criminal cases to the District Court. Those which involve the remission of cases such as the present one deal with the topic in little more than a sentence. For example in *Hoburn Homes Limited v. An Bórd Pleanala* [1993] ILRM 368, Denham J. made an order remitting the matter back to the planning board. She dealt with it in a single sentence in the judgment by observing that it was an appropriate case to do so. Similarly in *Aherne v. Kerry County Council* [1998] ILRM 392, Blayney J. remitted a matter back to the local authority in like manner. In *Hurley v. Motor Insurers Bureau of Ireland* [1993] ILRM 886, Carroll J. similarly referred a matter back to the council of the MIBI in the final sentence of her judgment.

The nearest one comes to any consideration of the topic is to be found in the judgment of Murray J. in *Nevin v. Crowley* [2001] 1 I.R. 113.

That was a case involving certiorari directed to a district judge concerning a criminal conviction. In the course of his judgment Murray J. said:

> 'This court, in *Sweeney v. Judge Brophy* [1993] 2 I.R. 202 at p. 211, held that the proper exercise of a court's discretion in such a case 'would require that the matter should not be remitted to the district court in circumstances where the appellant has endured enough and the prosecution cannot be acquitted of all the blame for some, at least, of what went wrong at the trial'. This is not to be considered an exhaustive list of relevant considerations concerning the exercise of discretion which could include such matters as the passage of time, any period of imprisonment already served, whether the offence was a serious one or a minor one'.

These observations do not have much relevance in the context of civil proceedings such as I am dealing with here.

I think the best that can be said is that the exercise of the discretion is a wide one and it would be both impossible and unwise to attempt to set out in a comprehensive fashion all the factors which the Court ought to take into consideration. That will have to be developed on a case by case basis. The one thing that can be said is that the discretion must be exercised both judicially and judiciously with the overall object of achieving a just result."

66. In final submissions on the issue of the remittal of the matter, the respondent asserts that the courts have remitted matters back to the Commissioner (*qua*

Information Commissioner) for rehearing on numerous occasions following an appeal on a point of law pursuant to s. 42 of the Freedom of Information Act 1997, which provision is indistinguishable from the provision in suit. Also the respondent cites *Rotunda Hospital v. Information Commissioner* [2011] 7 JIC 1904, where Fennelly J. observed remitting the matter for further consideration would be the appropriate procedure where the Commissioner had made an error in the factual reasons she gave and where they were the only reasons for setting aside her decision. In line with this, the respondent cites the decision of *F.P. v. Information Commissioner* [2009] IEHC 574 where Clark J. concluded the Commissioner erred in law, set aside the decision and remitted the matter for consideration. Also cited by the respondent is Denham J. in *N McK v. Information Commissioner* [2006] 1 I.R. 260, who held an incorrect test had been applied in that instance and directed the matter be remitted to the Commissioner for consideration. In light of these cases, the respondent submits that there cannot be any doubt as to the entitlement of the court to remit the matter to the Commissioner for consideration should it so wish.

Conclusions

67. The decision under examination in these proceedings is set out in three paragraphs on the ninth page of a document prepared by the respondent entitled 'Appeal to the Commissioner for Environmental Information, Case CEI/10/005'. The paragraphs to which I refer as follows:

> **"Decision**
>
> In accordance with Article 12(5) of the Regulations, I have reviewed the decision of NAMA in this case. I find, for the reasons set out above, that NAMA was not justified in refusing the appellant's request on the ground

that it is not a public authority within the meaning of the Regulations. I find that NAMA is in fact a public authority on the basis that it fits the criterion at item (vi) in the list of entities numbered (i) to (vii) which the definition of 'public authority' includes.

Having found that it is sufficient, for the purposes of meeting the definition of 'public authority', that a body is captured by any one of the provisions set out at items (i) to (vii) within the definition, there is no necessity in this present case to consider whether NAMA is captured also by any of the categories (a), (b) or (c) as contained in the definition.

I hereby annul the decision of NAMA and find that it is a public authority under Article 3(1)(vi) of the Regulations. In the light of this decision, NAMA must now deal with the appellant's request as first made by him on 3 February 2010. It is open to the appellant, should he so choose, to narrow the range of information which he seeks."

68. The nine-page document at the end of which the decision appears sets out the positions of the parties to the appeal. The party requesting the environmental information made a succinct argument identified by the Commissioner in the body of the appeal as follows:

"As a matter of plain English and logic, if a body falls within one of the categories 3(1)(i) to (vii), it is a public authority because it is included in the definition. The applicant is at a loss to understand how this Article can be interpreted in any other way."

69. NAMA's position was summarised by the Commissioner as follows:

"As I understand its position, NAMA argues that in order to qualify as a 'public authority' a body or person must first be captured in one or other of

the three categories identified at sub-paragraphs (a) to (c) of the definition. It argues that NAMA is not a body or a person captured at paragraphs (a) to (c) of the definition and therefore it cannot be regarded as a public authority for the purposes of the Regulations."

70. NAMA's argument was refined in a submission on 21st June 2011, and is identified as follows by the Commissioner:

> "[The] bodies identified between (i) to (vii) are bodies that might be included within the class of persons identified by sub-paragraphs (a) to (c) but which, (most importantly) must also have the properties provided for and required by sub-paragraph (c). It is for this reason that the use of the word 'includes' in the Regulations must have a limiting rather than enlarging effect. If an enlarging effect was seriously contended for, it would result in any board established under Statute falling within the definition of public authority and that would be to interpret the Regulations without any regard to their intended purpose."

71. The final aspect of NAMA's submission identified by the Commissioner was their argument that the Regulations were required to be interpreted in accordance with the parent EU Directive. NAMA submitted to the Commissioner that the definition of public authority in the Directive was intended to be more restrictive than that apparently provided for by the 2007 Regulations and that a proper interpretation of the 2007 Regulations would bring them back into line with the more restrictive European Directive definition.

72. The Commissioner reaches conclusions on the arguments advanced by the parties and these are set out in the appeal document under a section entitled

'Analysis'. The Commissioner rejects the argument that there is a difference between the 2007 Regulations and the European Directive and she says:

> "In any case, I am not persuaded that reliance on the plain meaning of the word 'includes', as used in the definition of 'public authority' in the Regulations, gives rise to an outcome which is at odds with the Directive. In fact, it is very arguable that the Directive encourages and enables Member States to take an expansive approach to what constitutes a 'public authority'."

73. Ultimately, the Commissioner explains her decision as follows:

> "In this case, the plain and ordinary meaning of 'includes' is expansive when used in a statutory definition. As used in the definition of 'public authority' at Article 3(1) of the Regulations, it provides that, 'whatever else', the listed entities are public authorities. For this reason alone, *ejusdem generis* does not apply. Moreover, I do not agree with NAMA that sub-paragraphs (a) to (c) in the definition of 'public authority' describe a particular *genus*. On the contrary, the terms used are general and subject to varying interpretations, whereas the list of bodies provided at (i) to (vii), though wide-ranging, is more specific in its terms. For instance, there is no ambiguity as to what the phrase 'a board or other body . . . established by or under Statute' means. I find that the *ejusdem generis* rule does not apply here."

74. In interpreting a statute a court's first duty is to discern the legislator's intention and this is derived from the ordinary and natural meaning of the words used by the legislator. As indicated earlier in this judgement, the matter was put succinctly

by Kelly J. in *O'Dwyer v Keegan* [1997] 2 ILRM 401 when he said " The intention, and therefore the meaning, of an Act, is primarily to be sought in the words used. They must, if they are plain and unambiguous, be applied as they stand. If there is nothing to modify, alter or qualify the language which is contained in the Act, then the words and the sentences must be construed in their ordinary and natural meaning."

75. Both parties have invoked the literal meaning of the words at issue. Given that both parties arrive at contrasting interpretations, the literal – the ordinary and natural - meaning might be said to lead to ambiguity but the mere fact that different interpretations are possible does not mean that legal ambiguity exists.

76. In relation to the literal rule of construction the Commissioner in her analysis refers to '*Statutory Interpretation in Ireland'* by David Dodd (Tottel Publishing Ltd, 2008) and quotes a particular passage at page 118 as follows:

> "5.12 Starting from the point that the text of the enactment is the pre-eminent indicator of the legislature's intention, two principal rules follow: the ordinary (or literal) meaning rule and the plain meaning rule. The former rule provides that words and phrases should be given their ordinary and natural meaning. The latter rule provides that where that meaning results in a provision being entirely plain and unambiguous, then the interpreter's job is at an end and effect must be given to that plain meaning."

77. I have some difficulty regarding the description of these principles by the learned author. I do not detect two rules within the literal rule. I prefer the formulation of these principles summarised not only by Kelly J. as mentioned but also as described by Brandon J. in *Pawys v. Pawys* [1971] P 340, and referred to by Barron J. in *O.H. v. O.H.* [1990] 2 I.R. 558, at 563 as follows:

> "The true principles to apply are in my view, these: that the first and most important consideration in construing a statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it."

78. Thus, a provision of a statute is to be interpreted by reference to the legislature's intention as evinced by the ordinary and natural meaning of the words which, if plain, should be observed. If the ordinary and natural meaning of the words lead to ambiguity or uncertainty or equivocation, then other canons of construction might be called in aid to assist with the interpretative exercise.

79. In *McCann Ltd. v. Ó Culacháin (Inspector of Taxes)* [1986] 1 I.R. 196, McCarthy J. commented upon ordinary meaning and legislative intent as follows:

> ". . . one must also, in aid of construction of the particular word as used in the statute, look to the scheme and purpose as disclosed by the statute or the relevant part thereof . . . The scheme and purpose of the relevant part of the statute appear to me to be the very context within which the word is used and the requirements of which must be examined in order to construe it."

80. In trying to identify the legislative intention I need look no further than the opening recitals in the 2007 Regulations where I find that the Minister announces that he makes the regulations "*in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive 2003 /4/EC*". It may sometimes be difficult for a court to identify legislative intent but in this instrument the legislator has spelled it out in black and white.

81. When the Minister deployed the words 'public authority means (a).....(b)..... and (c) and includes (i) to (vii)' in the statutory instrument, I must presume, in the words of Cooke J. in *MST & JT v Minister for Justice, Equality and Law Reform* (supra) that the legislative purpose of those words was to "to give full and accurate effect to the provisions of the Community measure and no more.", to which I might add "and no less".

If Ireland had expanded the European definition of 'public authority' by statutory instrument, it would have offended section 3 of the European Communities Act 1972 and Article 29 of the Constitution. Had it limited the definition, it would have breached EU Treaty obligations to transpose and give full effect to the parent directive.

82. The Minister could not lawfully deem a body or person to be a public authority unless such a body or person conformed to the definition of public authority in the directive. Thus the bodies or persons listed at 3(1)(i)-(vii) are public authorities within the meaning of the directive, and I must so presume, unless I am persuaded that such a person or body is not embraced by the definition of public authority in the directive.

83. This presumption of faithful transposition, as described by Cooke J. in *M.S.T*, is rebuttable. If the appellant established that NAMA did not come within the definition of public authority in the Directive that would rebut the presumption of faithful transposition. No such argument was addressed to me. Nor was that case made to the respondent at first instance. For the sake of completeness I should add that at an early stage of the investigation of this matter it was suggested by an officer of the respondent that NAMA was a public authority because of the operation of

Article 3(1) (b) – *viz.*, NAMA was a body performing public administrative functions. NAMA made a submission to the respondent contesting this proposition and this matter was not pursued by the respondent who confined her decision to the applicability of Article 3(1)(vi) and thus the question of whether NAMA was involved in any of the activities described in Article 2(2) (a), (b) and (c) of the Directive or the Irish replication of these provisions (at 3 (1) (a), (b) and (c)) was not before the respondent and was not before this court. (At the hearing of this case I enquired of the appellant if the Minster could have lawfully included NAMA as one of the named bodies deemed to be public authorities in order to see if NAMA was inside or outside the definition of public authority in the Directive. It was agreed that this enquiry should not be pursed by the Court as this matter had not been canvassed at first instance.)

84. I am persuaded that the respondent's approach to the interpretation of Article 3 of the 2007 Regulations is correct. I have no difficulty identifying the natural and ordinary meaning of the words at issue in these proceedings once the legislative intention is clear, as it is here. And on the application of the un-rebutted presumption of faithful transposition, the meaning of words used is beyond doubt. That being so, I have no need to resort to the *ejusdem generis* rule (which does not seem to me have any application in this case) or any other cannon of statutory interpretation for assistance

85. I interpret the words of Article 3 to say that 'public authority' means any person or body conforming to the descriptions at Article 3(1)(a)-(c) and 'public authority' also means any person or body or category listed in Article 3(1)(i)-(vii) or conforming to a description of a category of persons or bodies therein. Thus when the domestic legislator said 'public authority 'means X and includes Y', the legislator

intended every X and every Y to be a public authority for the purposes of the regulations.

86. There is an important difference between the bodies listed at Article 3(1) (i)-(v) and those listed at (vi) and (vii). Article 3(1)(i)-(v) identifies specific boards or corporations sole, Ministers, Harbour Authorities, the Health Service Executive, Local Authorities and the like, whereas the Article 3(1)(vi) and (vii) identifies state boards and companies. This distinction raises a question as to whether the specific persons or bodies at (i)-(v) are public authorities without reference to the criteria at (a)-(c).

My view is that the bodies or persons at (i) – (v) are public authorities without also needing also to qualify under (a)-(c). The reason this is so clear to me is that if the reader of the rule had to check if the named bodies at (i)-(v) were also within (a)–(c) listing them at (i) –(v) would serve no purpose. Critically, no distinction is drawn between the treatment of the bodies at (vi) and (vii) and those at (i)-(v). All are embraced equally by the phrase 'and includes'. Thus, either all have to be checked against (a)-(c) or none have to be checked. There is no question of different rules applying to items (i)-(v) and items (vi) and (vii).

87. To my mind a result which ensures that the words 'and includes' deems the first five bodies to be public authorities without further enquiry but has the opposite effect for sixth and seventh categories of bodies would be absurd. Either all are public authorities or all are public authorities subject to conforming to the criteria at 3(1)(a), and/or (b) and/or (c) and if the latter is the case, listing the bodies at (i)-(v) as being

included within the definition would serve no purpose that I can identify. I am not entitled to conclude that the words in question have no meaning.

88. Another matter which I bear in mind in this interpretive exercise is that the Directive, which repealed its predecessor, was adopted for the purpose of expanding the definition of public authority. (Recital Two of Council Directive 2003/4/EC provides, "this Directive expands the existing access granted under Directive 90/313/EEC".) As noted earlier in this judgment, Preamble 11 of the Directive provides that "the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment". Article 1 of the Directive sets out in clear terms the objectives of the legislation as follows: "(a) To guarantee the right of access to environmental information held by or for public authorities. .. (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information . . .". I take full account of the clearly stated objective of the Directive when interpreting its terms and when interpreting domestic implementing measures.

90. It is worth recalling here that Article 2 of the Directive sets out that "public authority" shall mean:-"(a) Government or other public administration, including public advisory bodies, at national, regional or local level;

> (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(c) any natural or legal person having public responsibilities or functions or providing public services relating to the environment under the control of a body or person falling within (a) or (b)."

91. It is difficult to imagine a broader definition of 'public authority'. The breadth of this definition of public authority has also persuaded me that the respondent has lawfully interpreted the 2007 Regulations.

92. I reject the contention that the words "and includes" in the 2007 Regulations is to be understood as "may include", for this ultimately is the true import of what the appellant has sought to argue in this case.

93. I accept the case made on behalf of the respondent that the effect of listing the natural or legal persons at Article 3(1)(i) – (vii) is to deem those persons or bodies to comprise public authorities for the purposes of the 2007 Regulations.

Remittal?

94. In the appellant's notice of motion commencing this statutory appeal, the appellant seeks "an order . . . setting aside the decision of the respondent . . . on the grounds that the respondent erred in law in finding that the appellant was a public authority within the meaning of the AIE Regulations" (the decision).

95. I have identified the decision taken by the respondent at paragraph 67 above. My conclusion is that the respondent has correctly interpreted the 2007 Regulations, though unlike the respondent I am not of the view that the words "and includes" has an expansive effect. As indicated, save within a narrow margin, a Minister making Regulations under s. 3 of the 1972 Act, is not authorised to expand a definition beyond that identified in a parent Directive. To this extent, I disagree with that part of the respondent's reasoning where she says that the words 'and includes' has

expansive effect. However, that reasoning is not contained in the text of the decision set out at paragraph 67 above, and the appellant's notice of motion makes no complaint about that part of the respondent's reasoning.

96. I agree with both parties that this Court has jurisdiction to remit this matter to the respondent. This jurisdiction is discretionary. I see no reason to remit the matter to the respondent as such remittal would not be for the purpose of altering her decision with which I agree. It would merely be for the purpose of adjusting the interpretative steps adopted by the her. Such error as there might have been in finding that the words "and includes" are expansive are corrected by this judgment and no further correction is required.

97. I dismiss the appeal.